BASRI MD DESA

v.

PP

HIGH COURT MALAYA, ALOR SETAR
ZAMANI A RAHIM J
[CRIMINAL APPEAL NOS: 41-01-2009 & 41-02-2009]
29 JUNE 2010

CRIMINAL PROCEDURE: *Charge - Defective charge - Appeal against - Accused charged under s. 56(1)(d) Immigration Act 1959/1963 - Whether charge defective for failure to specify mens rea of offence - Whether irregularity curable under s. 422 of the Criminal Procedure Code - Charge dismissed and appellant acquitted*

IMMIGRATION: *Harbouring - Harbouring of illegal foreign worker - Employed without valid work permit - Mens rea of offence not specified in charge - Whether charge seriously defective - Immigration Act 1959/1963, s. 56(1)(d)*

The prosecution had proffered two charges under s. 56(1)(d) of the Immigration Act 1959/1963 ('the Act') against the appellant. The first charge was that the appellant had on 2 September 2002, as a canteen operator, harboured three citizens of Thailand who were found working at the canteen wherein they had contravened the terms of the Visit Pass (Social) issued to them. The second charge was that the appellant had on 26 August 2002, as a canteen operator, harboured eleven citizens of Thailand who were found working at the canteen, wherein eight of them had Visit Pass (Social) and three of them had Visit Pass (Temporary Employment) belonging to a different employer and had contravened the terms of the Pass issued to them. The appellant was found guilty of both charges and was convicted and sentenced. The appellant appealed against conviction and sentence on the grounds that the charges were defective in law.

Held:

(1) The offence creating section stated on both the charges was s. 56(1)(d) of the Act. Section 56(1)(d) requires *mens rea* of the accused to be established. The section requires that either (a) the accused knew or (b) the accused reasonably believed that he was harbouring any person who had contravened the Act. (paras 4 & 5)

(2) Both the charges did not state that either the accused knew nor reasonably believed that the persons named in the charges had contravened the Act. Both the charges were therefore seriously defective because no offence had been disclosed under the section. (para 6)

(3) Based on the authority of *Takrip dan Sembilan Belas Orang Yang Lain v. Pejabat Imigresen Negeri Melaka*, the inclusion or incorporation of the words "knew or had reasonable grounds for believing" in the charges were of fundamental importance. (paras 6 & 7)

(4) Since the relevant statutory words denoting the essential ingredients of the offence, that is, knowledge or reasonable belief were omitted from both charges, the charges were wholly defective and the defect was not curable under s. 422 of the Criminal Procedure Code. On this score alone, the charges against the appellant had to be dismissed and the appellant was acquitted and discharged without his defence being called. (para 13)

Case(s) referred to:

Abdul Hamid Udin v. PP [2000] 1 LNS 198 ***(refd)***

Aw Yang Kee Chuan lwn. PR [1992] 2 CLJ 979; [1992] 1 CLJ (Rep) 398 HC ***(refd)***

Lee A Ba v. The Public Prosecutor [No. 36 of 1966] reported in Public Prosecutor v. Oie Hee Koi & Associated Appeals [1967] 1 LNS 132 ***(refd)***

Low Seng Way v. PP [1961] 1 LNS 55 ***(refd)***

Mee Lian Co v. PP [1961] 1 LNS 64 HC ***(refd)***

Pie Chin v. PP [1983] 1 CLJ 316; [1983] CLJ (Rep) 703 ***(refd)***

PP v. Low Ah Sang [1961] 1 LNS 90 HC ***(refd)***

Saw Tuan Cheong v. PP [1946] 1 LNS 31 ***(refd)***

Takrip dan Sembilan Belas Orang Yang Lain v. Pejabat Imigresen Negeri Melaka [2004] 1 LNS 305 HC ***(refd)***

Tan Kok Siong @ Tan Koh Heng v. Pendakwa Raya [1994] 1 LNS 158 ***(refd)***

Zulkiflee Mohd Dom v. PP [1997] 3 CLJ Supp 290 HC ***(refd)***

Legislation referred to:

Common Gaming Houses Act 1953, s. 4A(a)

Criminal Procedure Code, ss. 152(1), 156, 422

Immigration Act 1959/1963, ss. 54, 56(1)(d), 58(2)

Immigration Regulations 1963, reg. 39(b)

Penal Code, s. 411

Penal Code [Ind], s. 411

Other source(s) referred to:
Ratanlal & Dhirajlal's Law of Crimes, 25th edn 2002, para 38

For the appellant/accused - Burhanuddin Abd Wahid; M/s Burhan & Co
For the respondent - Ahmad Zakhi DPP

Reported by Amutha Suppayah

JUDGMENT

Zamani A Rahim J:

[1] The prosecution had proffered two charges under s. 56(1)(d) of the Immigration Act 1963 against the appellant as follows:

1) Kes No. 83-634-2002

Bahawa kamu pada 02.09.2002, jam lebih kurang 8.00 pagi, di Unit Penguatkuasa, Jabatan Imigresen Malaysia, Cawangan Sungai Petani, Tingkat 2, Wisma Keladi, Jalan Bank, Sungai Petani dalam Daerah Kuala Muda, dalam Negeri Kedah Darul Aman, sebagai pengusaha kantin telah didapati melindungi seramai tiga (3) orang warganegara Thailand seperti berikut:

Bil	Nama Jantina/Umur	Warganegara	Dokumen
1.	Asa Masnan (P - 47thn)	Thailand	BP: 12132
2.	Ropisah Domeng (P - 29 thn)	Thailand	BP: 038960
3.	Patimah Yan Yusoh (P - 16 thn)	Thailand	BP: 12533

yang didapati bekerja di Kantin Kilang SUMIRUBBER (M) SDN BHD, di kawasan Perindustrian Bakar Arang, Sungai Petani, dalam Daerah Kuala Muda, Negeri Kedah Darul Aman, yang mana mereka memiliki Pas Lawatan (Sosial) yang didapati telah melanggar syarat-syarat Pas yang diberikan kepada mereka. Oleh yang demikian, kamu telah melakukan kesalahan di bawah Seksyen 56(1)(d) Akta Imigresen 1959/1963 (Pindaan 2002) yang boleh dihukum di bawah Seksyen yang sama dalam Akta tersebut.

Translated into English the charge reads:

That you on 2.9.2002, at about 8.00 am situated at the Enforcement Unit, Immigration Department Malaysia, Sungai Petani Branch, 2nd Floor, Wisma Keladi, Jalan Bank, Sungai Petani in the

A District of Kuala Muda, Kedah Darul Aman, as a canteen operator was found to have harboured three (3) citizens of Thailand as follows:

Bil	Nama Jantina/Umur	Warganegara	Dokumen
1.	Asa Masnan (P - 47thn)	Thailand	BP: 12132
2.	Ropisah Domeng (P - 29 thn)	Thailand	BP: 038960
3.	Patimah Yan Yusoh (P - 16 thn)	Thailand	BP: 12533

Bil	Nama Jantina/Umur	Warganegara	Dokumen
1.	Asa Masnan (P - 47 thn)	Thailand	BP: 12132
2.	Ropisahdomeng (P - 29 thn)	Thailand	BP: 038960
3.	Patimah Van Yusoh (P -16 thn)	Thailand	BP: 12533

who were found working at the canteen of Kilang SUMIRUBBER (M) SDN BHD, at Bakar Arang Industrial Area in the District of Kuala Muda, Kedah Darul Aman, wherein they had contravened the terms of the Visit Pass (Social) issued to them. Therefore you have committed an offence under Section 56(1)(d) of the Immigration Act 1959/63 (Amended 2002) and punishable under the same section of the Act.

2) Kes No. 83-646-2002

Bahawa kamu pada 26.8.2002, jam lebih kurang 10.40 pagi, di Unit Penguatkuasa, Jabatan Imigresen Malaysia, Cawangan Sungai Petani, Tingkat 2, Wisma Keladi, Jalan Bank, Sungai Petani dalam Daerah Kuala Muda, dalam Negeri Kedah Darul Aman, sebagai pengusaha kantin telah didapati melindungi seramai sebelas (11) orang warganegara Thailand seperti berikut:

Bil	Nama Jantina/Umur	Warganegara	Dokumen
1.	Habdunroman Naesalae (L - 21 thn)	Thailand	BP: 13325
2.	Asari Yun Yusoh (L - 16 thn)	Thailand	BP: 1160

3.	Muhammadchapeedee (L - 20 thn)	Thailand	BP: 12470
4.	Timinah Naesalaeh (P - 51 thn)	Thailand	BP: X3055546
5.	Ratana Masman (P - 17 thn)	Thailand	BP: 12532
6.	Isararat Storlong (P - 22 thn)	Thailand	BP: 12531
7.	Hayasah Krommuang (P - 28 thn)	Thailand	BP: 13731
8.	Masitoh Kaping (P - 26 thn)	Thailand	BP: 032459
9.	Timah Yahyusoh (P - 31 thn)	Thailand	BP: 12133
10.	Nuresan Dursama (P - 22 thn)	Thailand	BP: 032875
11.	Sarha Meenar (P - 18 thn)	Thailand	BP: 032869

yang didapati bekerja di Kantin Kilang SANSHIN (M) SDN BHD, di kawasan Perindustrian Bakar Arang, Sungai Petani, dalam Daerah Kuala Muda, Negeri Kedah Darul Aman, yang mana lapan (8) daripada mereka memiliki Pas Lawatan (Sosial) dan tiga (3) lagi memiliki Pas Lawatan (Kerja Sementara) kepunyaan majikan lain, yang didapati telah melanggar syarat-syarat Pas yang diberikan kepada mereka. Oleh yang demikian, kamu telah melakukan kesalahan di bawah Seksyen 56(1)(d) Akta Imigresen 1959/1963 (Pindaan 2002) yang boleh dihukum di bawah Seksyen yang sama dalam Akta tersebut.

Translated into English the charge reads:

That you on 26.8.2002 at about 10.40 am situated at the Enforcement Unit, Immigration Department Malaysia, Sungai Petani Branch, 2nd Floor, Wisma Keladi, Jalan Bank, Sungai Petani, in the District of Kuala Muda, Kedah Darul Aman, as a canteen operator was found to have harboured eleven (11) citizens of Thailand as follows:

Bil	Nama Jantina/Umur	Warganegara	Dokumen
1.	Habdunroman Naesalae (L - 21 thn)	Thailand	BP: 13325
2.	Asari Yun Yusoh (L - 16 thn)	Thailand	BP: 1160
3.	Muhammadchapeedee (L - 20 thn)	Thailand	BP: 12470
4.	Timinah Naesalaeh (P - 51 thn)	Thailand	BP: X3055546
5.	Ratana Masman (P - 17 thn)	Thailand	BP: 12532
6.	Isararat Storlong (P - 22 thn)	Thailand	BP: 12531
7.	Hayasah Krommuang (P - 28 thn)	Thailand	BP: 13731
8.	Masitoh Kaping (P - 26 thn)	Thailand	BP: 032459
9.	Timah Yahyusoh (P - 31 thn)	Thailand	BP: 12133
10.	Nuresan Dursama (P - 22 thn)	Thailand	BP: 032875
11.	Sarha Meenar (P -18 thn)	Thailand	BP: 032869

who were found working at the canteen of Kilang SANSHIN (M) SDN BHD, at Bakar Arang Industrial Area, in the District of Kuala Muda, Kedah Darul Aman, wherein eight (8) of them had Visit Pass (Social) and three (3) of them had Visit Pass (Temporary Employment) belonging to a different employer, who had contravened the terms of the Pass issued to them. Therefore you have committed an offence under Section 56(1)(d) of the Immigration Act 1959/63 (Amended 2002) and punishable under the same section of the Act.

[2] The appellant claimed trial to both the charges, which were tried together. At the end of the entire trial, the appellant was found guilty, convicted and sentenced as follows:

1) For case no. 83-634-2002, a fine of RM10,000 for each illegal immigrant harboured, thus making a total of RM30,000 (for three illegal immigrants) in default 30 months imprisonment.

2) For case no. 83-646-2002, 12 months imprisonment with effect from the date of conviction and one stroke of whipping.

[3] The appellant was dissatisfied with the conviction and sentence, hence this appeal. The first complaint was relating to the procedural law in that the charges were not in accordance with the statute under which the appellant was charged. Thus the charges were said to be defective in law.

[4] As can be seen, the offence creating section stated on both the charges is s. 56(1)(d) of the Immigration Act which provides as follows:

56. Offences

(1) Any person who -

(a) (Deleted ...

(b) (Deleted ...

(c) (Deleted ...

(d) harbours any person whom he knows or has reasonable grounds for believing to have acted in contravention of this Act, except section 55E;

(e) (Deleted ....

shall be guilty of an offence and shall, on conviction ..

[5] Therefore, s. 56(1)(d) requires *mens rea* of the accused to be established before the accused can be found guilty of an offence under the section. The section requires that either (a) the accused knew or (b) the accused reasonably believed that he was harbouring any person who had contravened the Act.

[6] A careful look at both the charges, they do not state that either the accused knew nor reasonably believed that the persons named in the charges had contravened the Act. Both the charges are, therefore, seriously defective because no offence has been disclosed under the section. In support of his contention, the learned counsel was relying on the case of *Takrip dan Sembilan Belas Orang Yang Lain v. Pejabat Imigresen Negeri Melaka* [2004] 1 LNS 305, where ten accused in this case were charged under reg. 39(b)

of the Immigration Regulations 1963 and Low Hop Bing J (as he then was) explicitly explained the law relating to framing of charges in the following terms.

1. 10 applicants in 83-948-2004

Bahawa kamu bersama-sama pada 01.07.2004 jam lebih kurang 12.45 tengahari bertempat di Kilang Ideal Advantage Sdn Bhd, Lot 613, Pekan Tehel, Mukim Ayer Molek, 77200 Melaka, dalam Daerah Melaka Tengah di dalam Negeri Melaka, bukan seorang warganegara Malaysia, pemegang Pasport Indonesia No. AG726266, AG966109, AG373269, AG373103, AG373265, AG966129, AG373244, AG373125, AG966037 dan AG373246 setelah dibenarkan masuk dan berada di negara ini atas Pas Lawatan Kerja Sementara bagi sektor buruh binaan, dengan Syarikat Pembinaan Gallant Acres Sdn Bhd didapati telah melanggar syarat Pas di dalam passport milik kamu dengan bekerja di dalam kilang tersebut. Dengan demikian kamu didapati telah melakukan kesalahan di bawah Per. 39(b) Peraturan-Peraturan Imigresen 1963 dan boleh dihukum di bawah Peraturan yang sama.

[My translation: That you on 01.07.2004 at about 12.45 noon at the factory of Ideal Advantage Sdn Bhd, Lot 613, Pekan Tehel, Mukim Ayer Molek, 77200 Melaka, in the District of Melaka Tengah, in the State of Melaka, not being Malaysian citizens, as holders of Indonesian Passports No. AG726266, AG966109, AG373269, AG373103, AG373265, AG966129, AG373244, AG373125, AG966037 and AG373246, after having been permitted to enter and remain in this country on Temporary Work Visit Pass for the construction labour sector with the company Gallant Acres Sdn Bhd, were found to have contravened the condition in your Passport by working in the said factory and committed an offence under Reg. 39(b) of the Immigration Regulations 1963 and punishable under the same Regulation.

2. Six applicants in 83-949-2004

Bahawa kamu bersama-sama pada 01.07.2004 jam lebih kurang 12.45 tengahari bertempat di Kilang Ideal Advantage Sdn Bhd, Lot 613, Pekan Tehel, Mukim Ayer Molek, 77200 Melaka, dalam Daerah Melaka Tengah di dalam Negeri Melaka, bukan seorang warganegara Malaysia, pemegang Pasport Indonesia No AF429690, AF402356, AF364290, AF381858, AF402354 dan AF402374 setelah dibenarkan masuk dan berada di negara ini atas Pas Lawatan Kerja Sementara bagi sektor buruh binaan, dengan Syarikat Pembinaan Leow Tuck Chui & Sons Sdn Bhd didapati telah melanggar syarat Pas di dalam passport milik kamu dengan bekerja di dalam kilang tersebut. Dengan demikian kamu didapati telah melakukan kesalahan di bawah Per 39(b) Peraturan-Peraturan Imigresen 1963 dan boleh dihukum di bawah Peraturan yang sama.

[My translation: That you on 01.07.2004 at about 12.45 noon at the factory of Ideal Advantage Sdn Bhd, Lot 613, Pekan Tehel, Mukim Ayer Molek, 77200 Melaka, in the District of Melaka Tengah, in the State of Melaka, not being Malaysian citizens, as holders of Indonesian Passports No. AF429690, AF402356, AF364290, AF381858, AF402354, and AF402374, after having been permitted to enter and remain in this country on Temporary Work Visit Pass for the construction labour sector with the company Leow Tuck Chui & Sons Sdn Bhd, were found to have contravened the condition in your Passport by working in the said factory, and committed an offence under Reg. 39(b) of the Immigration Regulations 1963 and punishable under the same Regulation.

3. Four applicants in 83-951-2004

Bahawa kamu bersama-sama pada 01.07.2004 jam lebih kurang 12.45 tengahari bertempat di Kilang Ideal Advantage Sdn Bhd, Lot 613, Pekan Tehel, Mukim Ayer Molek, 77200 Melaka, dalam Daerah Melaka Tengah di dalam Negeri Melaka, bukan seorang warganegara Malaysia, pemegang passport Indonesia No. AF396835, AF528650, AF363640 dan AF242465 setelah dibenarkan masuk dan berada di negara ini atas Pas Lawatan Kerja Sementara bagi sektor buruh binaan, dengan Syarikat Pembinaan Capital Network Sdn Bhd didapati telah melanggar syarat Pas di dalam passport milik kamu dengan bekerja di dalam kilang tersebut. Dengan demikian kamu didapati telah melakukan kesalahan di bawah Per. 39(b) Peraturan-Peraturan Imigresen 1963 dan boleh dihukum di bawah Peraturan yang sama.

[My translation: That you on 01.07.2004 at about 12.45 noon at the factory of Ideal Advantage Sdn Bhd, Lot 613, Pekan Tehel, Mukim Ayer Molek, 77200 Melaka, in the District of Melaka Tengah, in the State of Melaka, not being Malaysian citizens, as holders of Indonesian Passports No. AF396835, AF528650, AF363640 and AF242465 after having been permitted to enter and remain in this country on Temporary Work Visit Pass for the construction labour sector with the company Capital Network Sdn Bhd, were found to have contravened the condition in your Passport by working in the said factory, and committed an offence under Reg. 39(b) of the Immigration Regulations 1963 and punishable under the same Regulation.

The Charges

[7] As the charges are preferred under reg. 39(b), I shall refer to the relevant portion of reg. 39(b) which reads as follows:

A 39. Penalties.

Any person who **without reasonable cause**:

(a) ...; or

B (b) contravene any condition imposed in respect of, any Pass, shall be guilty of an offence against these Regulations and shall be liable on conviction to a term of imprisonment not exceeding six months or to a fine not exceeding one thousand dollars or to both such imprisonment and fine. (emphasis added)

C

[8] It appears obvious to me that any person charged under reg. 39(b) shall only be guilty of an offence against the Immigration Regulations 1963 if but only if he has "without reasonable cause" ("the expression") contravened any condition D imposed in respect of any Pass. The specific inclusion or mention of the expression is of fundamental importance in that the offence created under reg. 39(b) is only an offence if the applicants' alleged contravention of a condition in the Pass was committed "without reasonable cause." (or "tanpa sebab, alasan atau kausa E munasabah").

[9] Upon a proper perusal of the aforesaid charges preferred against the applicants, there is clearly an obvious omission of the expression which forms an essential ingredient of the offence under F reg. 39(b), which was made by the Minister in exercise of the powers conferred by s. 54 of the Immigration Act 1959/63 pursuant to a delegation by Parliament.

[10] The drafting of the aforesaid charges against the applicants leaves much to be desired as these charges do not appear to follow G the words used and enacted in reg. 39(b). The charges may or may not have been subjected to strict legal scrutiny in the court below. However, on the day the applicants were brought to the magistrate's court ie, on 14 July 2004, written sanction has been given by the learned deputy public prosecutor under s. 58(2) of the Act. The H learned magistrate and the learned deputy public prosecutor both have considerable standing as legal officers, but no issue was raised by either of them pertaining to the legality, propriety, correctness or otherwise of the charges.

I **[11]** On my part, it is necessary and advisable to hark back to first principles in criminal law and procedure. Since the charges have clearly omitted the expression, they are, in my view, out of focus and defective. *The charges appear to give rise to the impression that the*

offence with which the applicants have been charged was an offence of strict liability in the sense that there would be no defence available to the applicants at all in any given factual circumstance. However, that was not to be the case under reg. 39(b), wherein the law entitles or allows the applicants to raise the defence of reasonable cause. Hence, the fundamental importance of including the expression in the charges is self-evident.

[12] It is trite law that the charges in question must be precisely formulated to include the specific accusation against the applicants who have the right to know and must have notice of the very nature of the charges at the first opportunity, so that they are being forewarned with clarity and certainty the essential elements or ingredients that the prosecution has to establish against them in order to ensure that they are forearmed in their defence for the purpose of directing all the evidence exclusively to the specific charges, in the instant case, under reg. 39(b).

[13] I am mindful of the provisions of s. 156 of the Criminal Procedure Code (FMS Cap. 6) ("CPC") to the effect that no error in stating either the offence or the particulars required to be stated in the charge, and that no omission to state the offence or those particulars, shall be regarded at any stage of the case, as material unless the accused was in fact misled by such error or omission. See eg: *Saw Tuan Cheong v. Public Prosecutor* [1946] 1 LNS 31; *Low Seng Way v. Public Prosecutor* [1961] 1 LNS 55; *Abdul Hamid Udin v. Public Prosecutor* [2000] 1 LNS 198; *Lee A Ba v. The Public Prosecutor [No. 36 of 1966] reported in Public Prosecutor v. Oie Hee Koi & Associated Appeals* [1967] 1 LNS 132; *Zulkiflee Mohd Dom v. Public Prosecutor* [1997] 3 CLJ Supp 290; *Pie Chin v. Public Prosecutor* [1983] 1 CLJ 316; [1983] CLJ (Rep) 703.

[14] Be that as it may, in the instant case, the omission is substantial and material in that the offence under reg. 39(b) is not a strict liability offence but one to which an accused may legitimately and properly raise the defence of "reasonable cause".

[15] In my view, the charges against the applicants do not completely disclose an offence under reg. 39(b) as s. 152(1) of the CPC has not been complied with. Section 152(1) of the CPC provides that every charge under this Code shall state the offence with which the accused is charged. This is a mandatory provision imposing the bounden duty on the prosecution to sufficiently particularize the defence of "without reasonable cause" in the charges so that each and every accused has adequate notice thereof.

A Further s. 152(1) of the CPC expressly provides that if the law which creates the offence gives it any specific name, the offence may be described in the charge by that name only.

[16] In *Tan Kok Siong @ Tan Koh Heng v. Pendakwa Raya* [1994] B 1 LNS 158; [1994] 3 AMR 52, 2775, the charge against the accused had failed to follow the wording of s. 4A(a) of the Common Gaming Houses Act 1953 constituting the offence in question. At pp. 2778 to 2780 I have the occasion to refer to a plethora of authorities pertaining to the caution to be exercised in the C formulation of a charge and to hold that a charge which has fallen short of this strict requirement is not legally sustainable.

[17] I have no doubt that the charges in question are so defective as to render it an illegality or a nullity which is impossible to cure under s. 156 and s. 422 of the CPC. This ground alone would have D expeditiously disposed of the revision herein without further ado.

[18] Based on the authority of *Takrip dan Sembilan Belas Orang Yang Lain, supra*, it is clear that, to borrow the words of Low Hop Bing J, "The specific inclusion or mention of the expression is of E fundamental importance in that the offence created under reg. 39(b) is only an offence if the applicants' alleged contravention of a condition in the Pass was committed "without reasonable cause". Similarly in this case, the inclusion or incorporation of the words "knew or had reasonable grounds for believing" in the charges are F of fundamental importance in that an offence that the accused knew or had reasonable grounds to believe that the persons named in the charges had contravened the Act.

[19] Not only Low Hop Bing J had voiced his dissatisfaction that G the charges was poorly drafted, similar concern may be traced back to the 60s. In *Mee Lian Co. v. PP* [1961] 1 LNS 64, Adams J said:

> I must yet again draw the attention of Prosecuting Officers to the necessity of drafting correct charges against the correct person and also of proving to the satisfaction of the Court all the ingredients of H the charge. Finally, it is the duty of the Court to see that the charge is properly drawn at the time it is read and explained to the defendant. This clearly could not have been done in this case.

[20] In *PP v. Low Ah Sang* [1961] 1 LNS 90 Hashim J said:

I > I shall now deal with the charge and the order of the learned President. In my opinion the charge was very badly drafted. In this respect I would commend all Presidents of Sessions Courts and Magistrates to read and digest the observations of the learned Chief Justice.

> In his oral judgment in *PP v. Syed Bakri* (Ipoh Criminal Revision No. 3 of 1955, unreported) his Lordship said: 'I have repeatedly emphasized that in framing charges prosecution officers should adhere as closely as possible to the wording of the statute constituting the offence which is charged and the Magistrates should be at pains to see that this is done. If it is done, the prosecution know what they have to prove and the accused person knows what is charged against him. If it is not done, then there is the danger of a muddle of the sort that has come to light in this case," as it has come to light in this appeal.

[21] The problem of formulating a legally correct charge do at times crop up in the Magistrate's and Sessions courts. This problem may be avoided if the prosecuting officers or learned Deputies, who frame the charges are meticulous and address their mind to them. When charges are brought and read in courts, the judges of the Sessions Courts and Magistrates must ensure that the charges are properly worded in accordance with the wordings of the statute under which the accused or offender is charged. Extra attention must be given to charges which involved rare and unfamiliar offences. If charges are found to be defective in law, a short adjournment may be sought to have them rectified. I would also advise the prosecuting officers or learned Deputies to refer to *Ratanlal & Dhirajlal's Law of Crimes* for specimen charges of offences under our Penal Code or better still to compile a correct specimen of charges for offences under our Penal Code and for various offences under other statutes such as Dangerous Drugs Act 1952, Corruption Act 1997, Immigration Act 1963, Customs Act 1967 etc.

[22] Outside the Immigration Act 1963, an expression or similar phrase involving mental element which is an essential ingredient of the offence can be found in the Penal Code, specifically the offence of retaining stolen property under s. 411. In *Aw Yang Kee Chuan lwn. PR* [1992] 2 CLJ 979; [1992] 1 CLJ (Rep) 398, it was held the element of knowledge or reasonable belief must be stated in the charge as it was an essential ingredient of the offence. Without knowledge or belief, no offence is disclosed or the offence is not complete. In his opening judgment at p 399, Abdul Aziz Mohammad J said:

A Terlebih dahulu saya perlu menegur bahawa pertuduhan pilihan terhadap perayu, iaitu pertuduhan di bawah mana dia disabitkan, tidak menyebut satu unsur penting bagi kesalahan di bawah s. 411 Kanun Keseksaan, iaitu unsur mengetahui atau mempunyai sebab untuk mempercayai barang yang berkenaan itu barang curi. Majistret-majistret hendaklah mengambil berat memastikan sesuatu pertuduhan itu menyebut setiap unsur (ingredient) bagi sesuatu kesalahan oleh kerana, jika mana-mana unsur tidak disebut, pertuduhan itu akan gagal memperlihatkan kesalahan.

[23] On the issue of drafting a proper charge for an offence of retaining stolen property under s. 411 of the Penal Code, reference is made to *Ratanlal & Dhirajlal's Law of Crimes*, 25th edn 2002, para 38 under the caption "Charge" and its specimen charge which is reproduced below. Of course, slight modification are to be made to include the place, district and state in which the offences are committed.

38. **Charge –** The charge should state that the articles found in the possession of the accused were the property of a certain person, who was the owner thereof. **It should also set forth that the accused knew or had reason to believe that the property he received was stolen property,** for without his knowledge or belief, the offence is not complete.

The charge should be as follows:

I (name and office of Magistrate) hereby charge you (name of accused) as follows:

That you, on or about the ... day of ... at ..., dishonestly received (or retained) stolen property, to wit ..., belonging to one AB, knowing or having reason to believe the same to be stolen property, and that hereby committed on offence punishable under s. 411 of the Indian Penal Code, and within my cognizance.

[24] In the premise, since the relevant statutory words denoting the essential ingredients of the offence, that is, knowledge or reasonable belief was omitted from both charges, the charges are wholly defective and the defect is not curable under s. 422 of the Criminal Procedure Code. On this score alone, the charges against the appellant must be dismissed. Accordingly the appellant was acquitted and discharged without his defence being called.